JD–79–17
Conroe, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONSOLIDATED COMMUNICATIONS HOLDINGS, INC. d/b/a CONSOLIDATED COMMUNICATIONS OF TEXAS COMPANY

and **CASES 16–CA–187792**
16–CA–192050

COMMUNICATION WORKERS OF AMERICA, AFL–CIO, LOCAL 6218

Laurie M. Duggan, Esq., for the General Counsel.
Matthew Holder, Esq. (David Van Os & Associates, P.C.), for the Charging Party.
David Lonergan **and** ***Amber M. Rogers, Esqs.*** ***(Hunton & Williams, LLP),*** for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Houston, Texas on August 7, 2017. The complaint alleged that Consolidated Communications Holdings, Inc. (Consolidated or the Respondent) violated §8(a)(1) and (3) of the National Labor Relations Act (the Act). On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' post-hearing briefs, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, Consolidated, a corporation with an office and place of business in Conroe, Texas (the Conroe office), has provided telecommunication services. Annually, it derives gross revenues in excess of $100,000, and provides services worth more than $5,000 directly outside of Texas. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6) and (7) of the Act. It also admits, and I find, that the Communication Workers of America, AFL–CIO, Local 6218 (the Union) is a labor organization, within the meaning of §2(5) of the Act.

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[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Consolidated provides internet, phone, television, and security products to residential and commercial customers. This litigation involves its Conroe office, and concerns: Kim Thompson, a customer service representative (CSR)[2] and Union official;[3] Diona Kelley, her first-line supervisor; and Kari Juni, her second-line supervisor. The pertinent facts are mainly undisputed.

B. Collective-Bargaining Unit

The parties have a longstanding collective-bargaining relationship. The Union is the exclusive collective-bargaining representative of a unit of CSRs, technicians, installers, and line workers employed at the Conroe facility (the unit).[4] (JT Exh. 1 at Art. 2, Exhs. A–C). Respondent's recognition of the Union has been embodied in successive contracts, the most recent of which ran from October 16, 2013 to October 16, 2016 (the 2013-16 CBA).[5] (Id.)

C. Negotiations for a Successor Contract

This litigation involves the parties' efforts to negotiate a successor contract to the 2013–16 CBA (the successor CBA). Bargaining for the successor CBA proved difficult, and did not conclude until May 2017.

D. October 13 – Union Demonstration and Dispute

Given that successor CBA negotiations were protracted and the 2013–16 CBA was set to expire on October 16, Union president Darrell Novark solicited Thompson to ask CSRs to stand and stretch for a short duration during the workday on October 13, in order to demonstrate the unit's support for the Union's bargaining stance. Thompson, accordingly, solicited 25 unit CSRs to participate in the demonstration.

At about 2 p.m. on October 13, Thompson and roughly 5 CSRs arose and stretched during working hours for about a minute to show solidarity. Thompson related that she was mostly able to continue working during the demonstration, although she conceded that she paused while photographing the demonstration.[6] Neither Thompson nor the other CSRs said

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2 CSRs work in partitioned-cubicles on computer stations. They speak to customers via telephone headsets.

3 Thompson presents grievances and represents workers at disciplinary meetings.

4 There are approximately 50 employees in the unit.

5 All dates herein are in 2016, unless otherwise stated.

6 She contrarily stated during cross-examination that she was not working during the demonstration. (Tr. 47).

anything, passed anything out, or left their workstations during the demonstration. Thompson, who indicated that employees can arrive late without issue and use restrooms at any time, averred that the demonstration had only a minor effect on productivity.

Christy Lindsey, another CSR, testified that she stood during the demonstration. She said that she took photos, and was not disciplined.[7]

Kelley indicated that certain CSRs advised her about Thompson's actions. She stated that she reported the situation to Juni, who instructed her to meet with Thompson.

E. October 13 Meeting and October 18 Warning

On October 13 at 2:15 p.m., Thompson met with Kelley. She recalled this exchange:

> She said that … two sources [told her about] … this picture taking and … standing up for solidarity for CWA, and that it was inappropriate,… against [the] rules, … [and] I knew better …. I said, "who told on me[?]," because if two other sources had told on me, she didn't see me …. [S]he said that that was … confidential … but the behavior was inappropriate and I should know better.
>
> I said, "well, is that it[?]," and she said, "yeah, that's it unless you have anything to say," and I didn't, so I went back to my desk.

(Tr. 40); see also (GC Exh. 3). Kelley generally corroborated Thompson's account.[8]

On October 18, Thompson received a verbal warning. (JT Exh. 2). Juni stated that a verbal warning was warranted because she interrupted work and violated the 2013-16 CBA's no strike/no slowdown provision. She denied that Union animus played any role in the discipline. Thompson acknowledged that, as a Union official, she maintained a generally cordial relationship with Consolidated. (Tr. 50).

F. Relevant Provisions of the 2013-16 CBA[9]

Art. 5, *Service Interruption* of the 2013-16 CBA provided that, "[d]uring the term of this agreement, the parties mutually agree that they will not disrupt … work … by strike, walkout, …, slow down, sick out or lockout." (JT Exh. 1). Consolidated avers that Thompson violated the above-described provision. It is undisputed that the demonstration occurred before the 2013–16 CBA expired.

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7 There was no evidence that Consolidated knew about her actions prior to the hearing.

8 She made a minor clarification; she said that the "two sources" only told her that Thompson had solicited them.

9 Thompson's actions occurred on October 13 (i.e., just days before the 2013-16 CBA expired on October 16).

III. ANALYSIS

A. §8(a)(3) Allegation[10]

Thompson's warning was valid. In assessing whether a personnel action violates §8(a)(3), the Board applies a mixed motive analysis. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel (the GC) must first demonstrate, by a preponderance of the evidence, that a worker's protected conduct was a motivating factor in the adverse action. He satisfies this initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. The Board has held that animus can be inferred from, inter alia, suspicious timing, false reasons given in defense of the contested action, inadequate investigation, departures from past practices, past tolerance of the behavior at issue and disparate treatment. *Medic One, Inc.*, 331 NLRB 464, 475 (2000). If the GC meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must show that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails to show that it would have taken the same action regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

1. Prima Facie Case

The GC presented a prima facie case. Thompson engaged in Union activity by presenting grievances. Consolidated knew of her activities. Animus for the purpose of the prima facie case can be inferred from the fact that, although 6 workers participated in the slowdown, only Thompson, a Union official, was disciplined. *Medic One, Inc.,* supra (inference of animus from disparate treatment).

2. Employer's Reply

Consolidated persuasively demonstrated that Thompson would have received a verbal warning absent her protected activity. *First*, although she undisputedly engaged in protected activity as a Union representative handling grievances, her instigation of a slowdown, while the 2013–16 CBA's strike and slow down prohibition was effective, was unprotected and formed a reasonable disciplinary basis.[11] See, e.g., *Daimler Chrysler Corp.*, 344 NLRB 1324,

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10 This allegation is listed under complaint pars. 10 and 14.

11 Although the GC contends that the demonstration was neither a slowdown nor a strike, this argument is invalid for several reasons. *First*, Thompson conceded that she was not performing any work function during the demonstration. (Tr. 47). *Second*, she and Lindsey were clearly unable to work, while taking

1325 (2005)("employees who engage in deliberate 'slowdowns' of work or encourage others to do so are engaged in activities not protected by the Act, and their discipline for such activity does not violate the Act."); *Davis Electric Contractors, Inc*., 216 NLRB 102 (1975); *Elk Lumber Co.*, 91 NLRB 333, 337, 338 (1950); *General Electric Co.*, 155 NLRB 208, 220-221 (1965); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973). Moreover, Thompson's warning solely focused upon her unprotected slowdown instigation, and bore no connection to her protected grievance-handling activities. *Second*, although Consolidated disciplined Thompson more severely than the roughly 5 other rank-and-file CSRs, who also participated in the slowdown (i.e., only Thompson received discipline), the Board has held that an employer can lawfully discipline a Union official such as Thompson, who instigates a work stoppage, more severely than non-instigator employee participants.[12] See, e.g., *Midwest Precision Castings Co.*, 244 NLRB 597, 599 (1979)(an employer faced with an unprotected strike in the face of a no-strike clause need not discharge or otherwise discipline all employees who participate); *California Cotton Cooperative Association, Ltd.*, 110 NLRB 1494 (1954); *McLean Trucking Company*, 175 NLRB 440, 450–451 (1969); *Chrysler Corp., Dodge Truck Plant*, 232 NLRB 466 (1977). *Third*, there is no evidence that Consolidated has a poor relationship with the Union. On the contrary, Thompson conceded that she enjoyed a generally cordial relationship. *Finally*, Thompson's punishment (i.e., a de minimis verbal warning) hardly exceeded the bounds of reasonableness. Or put another way, Consolidated did not seize upon Thompson's unprotected actions as a venue to devastate a Union advocate during hard bargaining. It, instead, meted out the industrial equivalent of a slap on the wrist that primarily educated a workplace leader about a misunderstood rule. I find, as a result, that the verbal warning was lawful, and that Consolidated abundantly demonstrated that it took a very minor disciplinary action against Thompson on the basis of her unprotected instigation of a slowdown that violated the 2013–16 CBA.[13]

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photos. *Third*, it is highly likely that the other 4 employee-participants did not engage in any work during the stand and stretch demonstration. The GC failed to have them testify, and establish otherwise. *Lastly*, the GC conceded in her brief that some services were, in fact, withheld during the demonstration. GC Br. at 10 ("[e]mployees either continued working or *immediately returned to working after stretching*." (Emphasis added.)). I find, as a result, that the demonstration was at least a slowdown covered by the 2013-16 CBA's *Service Interruption* clause (i.e., it was minimally a concerted delay and interruption of the CSRs' work duties). See §501(2) of the Act (expansively defining a "strike" or work stoppage as "any strike or other concerted stoppage of work by employees … and *any concerted slowdown* or other concerted interruption of operations by employees." (Emphasis added)).

12 Thompson organized the slowdown, solicited 25 CSRs to participate, and took connected photos for the Union.

13 It's noteworthy, and mildly disappointing, that the Union could have easily waited a mere 3 days (i.e., when the 2013–16 CBA expired on October 16) for the slowdown to become protected. Had it done so, the *Service Interruption* clause would have expired, and Thompson would not have been subject to disciplinary jeopardy at her employer's discretion. See, e.g., *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 4 (2015).

B. §8(a)(1) Allegations[14]

1. Impression of Surveillance Allegation

Kelley lawfully told Thompson that "2 sources" reported the slowdown. An employer creates an unlawful impression of surveillance when reasonable employees would assume that their *protected activities* are being watched. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295-1296 (2009). As a result, when an employer tells employees that it is aware of their *protected activities*, but, fails to identify their source, an unlawful impression of surveillance is created because employees could reasonably surmise that employer monitoring has occurred. *Conley Trucking*, 349 NLRB 308, 315 (2007). In the instant case, however, Kelley only cited Thompson's *unprotected activities,* and there was no basis for Thompson to assume that her protected activities were under surveillance. These comments were, therefore, valid.

2. Alleged Threat

Kelley lawfully told Thompson that she should have "known better." Given that the underlying verbal warning itself was valid, Kelley's connected statement that Thompson, a Union leader, who enforces the contract, should understand the basis for her valid discipline and how to apply the *Service Interruption* clause going forward was fair and rational.

Conclusions of Law

1. Consolidated is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

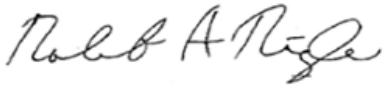
2. Consolidated did not violate the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed in its entirety.

Dated Washington, D.C. September 28, 2017



Robert A. Ringler
Administrative Law Judge

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14 These allegations are listed under complaint pars. 11 through 13.

15 If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.